Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn Bhd & Ors

HIGH COURT (MIRI) — SUIT NO 22–60 OF 2002(MR)
ABDUL AZIZ ABDUL RAHIM JC
15 JANUARY 2004

Civil Procedure — Summary judgment — Delay in application for summary judgement — Three months delay against the first defendant and one month delay against the third defendant — No explanation for delay — Whether summary judgment could be granted

Civil Procedure — Summary judgment — Triable issues — Whether plaintiff had cause of action — Bare assertion of collateral contract — Whether assertion made by defendant relevant — Whether agreement was onerous and unfairly tilted in favour of plaintiff — Whether constitutes triable issues

Contract — Damages — Interest — Interest rate — Whether interest rate excessive — Whether contravenes s 75 Contracs Act 1950 — Contracts Act 1950 s 75

The first defendant took out a loan from Hong Kong Bank Malaysia Bhd ('HSBC'). The loan was guaranteed by the third defendant. On 14 July 1999, by a vesting certificate, all the rights and interests of HSBC in the loan were vested in the plaintiff. Following the vesting and on the request of the first defendant, the plaintiff and the first defendant entered into a Restructuring Agreement. Later, the first defendant defaulted on the repayment. The plaintiff issued a letter of demand and thereafter commenced an action against the defendants and filed an application for summary judgment against the defendants. The defendants opposed the application and raised several issues, inter alia, (i) there was a three and a half month delay against the first defendant and a one month delay against the third defendant and in support, the defendants' counsel cited *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134; (ii) the plaintiff had no cause of action; (iii) there was a collateral contract with HSBC; (iv) the Restructuring Agreement was entered into without the benefit of independent legal advice, it was onerous and unfairly tilted in favour of the plaintiff and (v) the interest rate in the Restructuring Agreement was excessive, unconscionable and irrecoverable as against s 75 of the Contracts Act 1950.

Held, allowing the plaintiff's application:

(1) What was stated by Salleh Abbas LP in *Krishnamurthy* was only obiter and delay could not provide the answer to an O 14 application if there was no triable issue. The principle that a plaintiff is entitled to an O 14 judgment if the defendant cannot show a triable issue is a time tested principle and makes good sense. The judicial trend now is to give consideration to substantial justice — real justice; rather than to defeat a meritous claim merely on grounds of technicality. The delay in this case could not defeat the plaintiff's claim which has merits (see paras 25 and 26).

(3) A perusal of the plaintiff's statement of claim clearly showed that the statement of claim contained all material facts that needed to be pleaded by the plaintiff to bring to the attention of the defendants the case against them, and the first defendant admitted and acknowledged that he was indebted to the plaintiff for the sum stated in the Restructuring Agreement (see para 27).

(4) The claim of collateral contract by the defendants was only a bare assertion without any documentary evidence in support, therefore it does not add up to triable issues that necessitate a full trial. The borrowing by the first defendant from HSBC ran into millions. If the term of payment was the sales of the Imperial Court, it constituted a material term to the loan arrangement between the first defendant and HSBC and HSBC would have certainly included that in their facility documentation as a term of repayment of the facilities offered. Also, when the first defendant approached the plaintiff to restructure the loan facilities that have been vested with the plaintiff, the first defendant entered into a fresh and new negotiation with the plaintiff (see para 30).

(5) To rule the Restructuring Agreement was oppressive and unconscionable, the defendants must show that the plaintiff has taken undue advantage of the defendant's relatively weak bargaining position and imposed terms and conditions that are morally unconscionable and unfair. However, the defendants have failed to do so (see para 35).

(6) The interest charged was a covenanted interest rate agreed by the parties as cl 2.3 of the Restructuring Agreement clearly provided for it. Therefore, the plaintiff may charge such rate and not offend s 75 of the Contracts Act 1950 (see para 37).

[Bahasa Malaysia summary

Defendan pertama mengambil satu pinjaman daripada Hong Kong Bank Malaysia Bhd ('HSBC'). Pinjaman tersebut dijamin oleh defendan ketiga. Pada 14 Julai 1999, melalui sijil letakhak, kesemua hak dan kepentingan HSBC di dalam pinjaman tersebut diletakhakkan kepada plaintif. Berikutan perletakan hak tersebut dan di atas permintaan defendan pertama, plaintif dan defendan pertama telah memasuki satu perjanjian penyusunan semula. Defendan pertama kemudiannya telah ingkar membuat pembayaran balik. Plaintif mengeluarkan surat tuntutan dan kemudiannya memulakan tindakan terhadap defendan-defendan dan memfailkan permohonan untuk penghakiman terus terhadap defendan-defendan. Defendan-defendan melawan permohonan tersebut dan membangkitkan beberapa isu yang antara lainnya adalah, (i) terdapat kelewatan selama tiga setengah bulan terhadap defendan pertama dan kelewatan selama sebulan ke atas defendan ketiga dan sebagai sokongan, peguam defendan menyebut kes *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134; (ii) plaintiff tidak mempunyai kausa tindakan; (iii) terdapat kontrak kolateral dengan HSBC; (iv) perjanjian penyusunan semula ditandatangani oleh defendan tanpa mendapat nasihat undang-undang yang bebas, ia

membebankan dan secara tidak adil memihak kepada plaintiff; dan (v) kadar faedah di dalam perjanjian penyusunan semula adalah keterlaluan, tiada belas dan tidak dapat dituntut kerana bertentangan dengan s 75 Akta Kontrak 1950.

Diputuskan, membenarkan permohonan plaintif:

(1) Apa yang dinyatakan oleh Salleh Abbas LP di dalam *Krishnamurthy* hanyalah obiter dan kelewatan bukanlah jawapan kepada permohonan A 14 jika tiada isu yang boleh dibicarakan. Prinsip bahawa seorang plaintif berhak kepada penghakiman A 14 jikalau defendan tidak dapat menunjukkan isu yang dapat dibicarakan adalah prinsip yang lapuk dan dapat dierti. Trend kehakiman sekarang adalah untuk memberi pertimbangan kepada keadilan – keadilan sebenarnya; daripada mengatasi tuntutan yang bermerit pada alasan-alasan teknikal. Kelewatan di dalam kes ini tidak dapat mengatasi tuntutan plaintif yang bermerit (lihat perenggan 25 dan 26).

(2) Satu penelitian penyataan tuntutan plaintif menunjukkan bahawa penyataan tuntutan mengandungi kesemua fakta-fakta material yang perlu dituntut oleh plaintif untuk membawa tuntutannya ke perhatian defendan-defendan mengenai kesnya terhadap mereka, dan defendan pertama telah mengakui bahawa beliau terhutang kepada plaintif jumlah yang dikatakan di dalam Perjanjian Penyusunan Semula (lihat perenggan 27).

(3) Tuntutan defendan-defendan mengenai kontrak kolateral hanya satu pernyataan semata tanpa sebarang sokongan keterangan dokumentar, oleh yang demikian ianya tidak menjadi isu yang boleh dibicarakan yang memerlukan bicara penuh. Pinjaman oleh defendan pertama daripada HSBC adalah berjuta-juta. Jika terma bayaran adalah jualan Imperial Court, ia adalah terma material kepada persetujuan pinjaman di antara defendan pertama dan HSBC dan HSBC tentu akan memasukkannya di dalam dokumen kemudahannya sebagai terma bayaran semula kemudahan yang ditawar. Lagipun, apabila defendan pertama berjumpa dengan plaintif untuk menyusun semula kemudahan pinjaman yang telah diletakhak di atas plaintif, defendan pertama telah memasukki perundingan baru dengan plaintif (lihat perenggan 30).

(5) Untuk memutuskan yang Perjanjian Penyusunan Semula adalah menindas dan tiada belas, defendan-defendan hendaklah membuktikan bahawa plaintif telah mengambil kesempatan terhadap kedudukan defendan yang lemah dan mengenakan terma dan syarat yang tiada belas bermoral dan tidak adil. Namun begitu, defendan-defendan gagal berbuat demikian (lihat perenggan 35).

(6) Kadar faedah yang dikenakan adalah kadar faedah yang telah dipersetujui oleh pihak-pihak kerana ianya diperuntukkan dengan jelas di bawah kl 2.3 Perjanjian Penyusunan Semula. Oleh yang demikian, plaintif boleh mengenakan kadar tersebut dan tidak bertentang dengan s 75 Akta Kontrak 1950 (lihat perenggan 37).]

Notes

For cases on delay in application for summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5898–5905.

For cases on triable issues, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.

For cases on interest in damages, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2899-2900.

For summary judgment under O 14, see 1 *Halsbury's Laws of Malaysia*, para [10.6-048].

Cases referred to

Abdol Mulok Awang Damit v Perdana Industri Holdings Bhd [2003] 3 CLJ 497, [2003] 4 MLJ 441

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1994] 2 MLJ 180

Alec Lobb (Garages) Ltd and others v Total Oil GB Ltd [1985] 1 All ER 303

Arab-Malaysian Credit Bhd v Dominance Resources Sdn Bhd & Anor [2001] CLJ 268

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400

Bumiputra Merchant Bankers Bhd v The Melewar Corp Bhd & Ors [1990] 1 CLJ 693 (Rep)

Cassell & Co Ltd v Broome & Anor [1972] AC 1027

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829. [1997] 3 CLJ 365

Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1991] 2 CLJ 614 (Rep)

Krishnamurthy & Anor v Malayan Finance Corp Bhd [1986] 2 MLJ 134

Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn Bhd & Ors [1999] 6 MLJ 153, [1999] 2 CLJ 977

Loo Sze Kin v Cheong Choy Teik [1977] 4 MLJ 537

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300

Ng Hee Thong & Anor v Public Bank Bhd [1995] 1 MLJ 281

OCBC Bank (Malaysia) Bhd v GKM Amal & Anor [1999] 7 CLJ 73

Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818, [1998] 1 AMR 258

Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2001] 1 MLJ 513

Standard Chartered Bank Malaysia Bhd v Eng Song Huat [1996] 1 MLJ 446

Legislation referred to

Contracts Act 1950 s 75

Pengurusan Danaharta Nasional Bhd Act 1998 s 14, (6)

Rules of the High Court 1980 O 14 rr 1, 2, O 18 r 7

Lim Lip Sze (Reddi & Co) for the plaintiff
Idris bin Abdullah @ Das Murthy (Idris & Co) for the defendants

Abdul Aziz Abdul Rahim JC:

[1] There are two applications before me. They are encl 42 and encl 52. Enclosure 42 is the plaintiff's application to enter summary judgment underO 14 r 1 of the Rules of the High Court 1980 ('RHC') for a sum of RM97,049,433.44 with interest at 9.40%pa from 1 January 2002 until full and final settlement (see para 17 of plaintiff's statement of claim dated 30October 2002) against the first defendant. Enclosure 52 is a similar application by the plaintiff for a similar order against the third defendant.

[2] The applications arose out of a writ of summons taken by the plaintiff against four defendants, of which the first and the third defendants are two of them. The writ was dated 30 October 2002 and was indorsed with a statement of claim of the same date. The indorsed writ was duly served on the defendants. The first defendant is sued as a principal borrower and the third defendant is sued as a guarantor.

[3] In support of the applications, the plaintiff filed several affidavits. In respect of encl 42 the following affidavits were filed:

(a) affidavit by Kris Azman bin Abdullah affirmed on 2 April 2003 ('Azman's first affidavit');

(b) affidavit in reply by Kong Mun Chong affirmed on 20 June 2003 ('Chong's affidavit');

(c) affidavit in reply by Kris Azman bin Abdullah affirmed on 20 June 2003 ('Azman's second affidavit').

[4] The first defendant had filed the following affidavits:

(a) affidavit in reply by Hii Tiong Hua affirmed on 12 May 2003 ('Hua's first affidavit');

(b) affidavit in reply by Hii Tiong Hua (no. 2) affirmed on 10 June 2003 ('Hua's second affidavit');

(c) affidavit in reply by Hii Tiong Hua (no. 3) affirmed on 7 July 2003 ('Hua's third affidavit');

(d) corrective affidavit by Hii Tiong Hua affirmed on 18 March 2003 ('Hua's corrective affidavit').

[5] In respect of encl 52 the plaintiff filed the following affidavits:

(a) affidavit by Kris Azman bin Abdullah affirmed on 21 May 2003 ('Azman's affidavit');

(b) affidavit in reply by Kong Mun Chong affirmed on 1 August 2003 ('Kong's affidavit'); A

(c) affidavit in reply by Kris Azman bin Abdullah affirmed on 29 August 2003 ('Azman affidavit no. 2').

[6] In reply to the above affidavits by the plaintiff in encl 52, the third defendant filed the following affidavits in reply: B

(a) affidavit in reply by Hii Tiong Kheng affirmed on 27 July 2003 ('Kheng''s first affidavit');

(b) affidavit in reply by Hii Tiong Kheng affirmed on 18 August 2003 (Keng's second affidavit'); C

(c) affidavit in reply by Hii Tiong Kheng affirmed on 15 September 2003 ('Kheng's third affidavit').

[7] The brief background facts to the applications may be stated as follows: the first defendant had taken a loan facility offered by Hong Kong Bank Malaysia Berhad ('HSBC') to finance the first defendant's development project known as the Imperial Mall and Courts ('Imperial Court')] in Miri, Sarawak. The facilities, offered by HSBC and accepted by the first defendant, are evident in exhs KA-1, KA-2, KA-3, KA-4, KA-5, KA-6 and KA-7 in Azman's first affidavit and Azman's affidavit in encll 42 and 52 respectively. The third defendant stood as one of the guarantors to HSBC for the said facilities extended to the first defendant. Due to the Asian Economic Crisis of 1997 the first defendant defaulted on the repayment of the loan/facilities to HSBC and has not been able to repay the loan on the terms agreed between them. D E F

[8] By a vesting certificate dated 14 July 1999 issued pursuant to s 14 of the Pengurusan Danaharta Nasional Berhad Act 1998, all rights, titles and interests of HSBC in the loan facilities that had been extended to the first defendant by HSBC were vested in the plaintiff effective from 27 May 1999. G

[9] Following the vesting, and at the request of the first defendant, the plaintiff and the first defendant had, on 22 August 2000, entered into an agreement — a Restructuring Agreement ('RA') — to restructure the loan on terms and conditions contained in the RA. The RA is evident by exh KA-9 in Azman's first affidavit and Azman's affidavit in encll 42 and 52 respectively. The material terms of the RA are as follows: H

Clause 1.1

The Borrower confirms, acknowledges with PDNB that as at the 31st day of December, 1999, the Borrower is truly and justly indebted to PDNB pursuant to the Facilities and the Transaction Documents in the following sums: I

Principal Amount due under the Facilities	Interest	Overdue Interest/Penalty
RM72,000,000.00	RM12,236,103.67	RM1,561,572.35

(hereinafter referred to as 'the Agreed Amount Outstanding as at 31st day of December, 1999')

Clause 1.2

On condition that the Borrower strictly complies with the terms and conditions herein, PDNB agrees to and shall waive the following interest and overdue interest/penalty ('the Amount Waived') as follows:-

Total Amount to be Waived	Interest	Overdue Interest/Penalty
RM1,797,676.02	RM236,103.67	RM1,561,572.35

PROVIDED THAT the Borrower strictly complies with the terms and conditions herein, the amounts payable by the Borrower to PDNB, after deducting the Amount Waived shall be RM84,000,000.00 as at the first day of January, 2000 (the principal sum and capitalised interest shall hereinafter be referred to as 'the Revised Principal Amount') full particulars of which are as follows:

Principal	Interest	Total
RM72,000,000.00	RM12,000,000.00	RM84,000,000.00

Clause 2.1

The Revised Principal Amount shall be paid by the Borrower to PDNB together with further interests thereon at the rate of two percent (2%) per annum over and above Malayan Banking Berhad's prevailing Base Lending Rate per annum (hereinafter referred to as 'the Agreed Rate') in the following manner:-

On or before the 31st December	Minimum Revised Principal Amount to be repaid
2000	RM 9,000,000.00
2001	RM12,000,000.00
2002	RM16,000,000.00
2003	RM22,500,000.00
2004	RM24,500,000.00
Total	RM84,000,000.00

Clause 2.2

The Borrower shall pay interests on the Revised Principal Amount at the Agreed Rate simultaneously upon payment of the Revised Principal Amount as provided in Clause 2.1 above.

Clause 2.3

In the event of any delay or default in the payment of any of the Minimum Revised Principal Amount in the manner as prescribed in Clause 2.1 above or any interests on the Revised Principal Amount in manner as prescribed in Clause 2.2 above or in the event the Borrower breaches any other terms or conditions herein contained, PDNB shall become immediately entitled to reinstate and charge the Amount Waived to the account of the Borrower and PDNB shall become entitled to demand from the Borrower the Agreed Amount Outstanding as at 31st day of December, 1999 or any part thereof together with the interests at the Agreed Rate thereon from the 1st day of January, 2000 till date of full and final settlement. In addition to the Agreed Rate, a default rate of 1% per annum above the Agreed Rate shall be payable by the Borrower on the Amount Outstanding as at 31st day of December, 1999 or part thereof.

[10] In breach of cl 2.1 of the Restructuring Agreement, the first defendant failed to pay to the plaintiff the revised principal amount together with further interest thereon in the manner as provided in cl 2.1 of the Restructuring Agreement.

[11] Further, in breach of cl 2.2 of the Restructuring Agreement, the first defendant failed to pay interest on the revised principal amount at the agreed rate of 2%pa above Malayan Banking Bhd's ('MBB's') Base Lending Rate.

[12] By reason of the default by the first defendant as stated above, pursuant to cl 2.3 of the Restructuring Agreement, the plaintiff becomes entitled to demand from the first defendant the agreed amount outstanding as at 31December 1999 or any part thereof together with interest thereon at the agreed rate and default interest at the default rate of 1% above the agreed rate.

[13] The amount outstanding by the first defendant to the plaintiff calculated in accordance to the provisions of cl 2.3 of the Restructuring Agreement inclusive of interest thereon at the rate of 2%pa above MBB's Base Lending Rate and default interest of 1%pa calculated up to 31 December 2001 was RM97,049,433.44 (Ringgit Malaysia ninety seven million and forty nine thousand four hundred and thirty three and sen forty four only). MBB's Base Lending Rate as at 1 January 2002 is 6.40%pa.

[14] Accordingly, by letter of demand dated 5 March 2002, the plaintiff through Messrs Reddi & Co, Advocates, demanded from the first defendant the sum of RM97,049,433.44 (Ringgit Malaysia ninety seven million and forty nine thousand four hundred and thirty three and sen forty four only) as at 31 December 2001 with interest thereon at the rate of 2%pa above MBB's Base Lending Rate together with default interest of 1%pa from 1 January 2002 till date of full and final settlement.

[15] The first defendant has failed, refused and/or neglected to pay the amount demanded or any part thereof.

[16] As a result thereof, the plaintiff therefore commenced this action against the defendants and filed the applications herein for summary judgment against the defendants.

[17] The principles for O 14 r 1 summary judgment are clearly stated in the Federal Court of *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300. In that case the court said that certain preliminary requirements need to be satisfied before the court can consider an application for summary judgment under O 14 r 1 of the RHC. These requirements are: a) that the defendant has entered appearance; b) that the statement of claim has been served on defendant and c) the affidavit in support of the application must comply with O 14 r 2 of the RHC in that the deponent must state clearly in the affidavit his or her belief that the defendant has no defence to the claim. If the court is satisfied that the aforementioned requirements have been complied with the burden shifts to the defendant to show that there are triable issues (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400).

[18] The first and third defendants opposed the plaintiff's applications. They raised several issues. The first issue is that of delay. Learned counsel for the defendants submitted that the plaintiff filed the writ on 2 November 2002. The first defendant entered unconditional appearance on 3 December 2002 and the third defendant did the same on 10 April 2003. The first defendant then filed and served the defence on 23 December 2002. The third defendant filed and served his defence on 28 April 2003. But the plaintiff filed the application for O 14 summary judgment against the first defendant only on 11 April 2003 and against the third defendant on 27 May 2003. Therefore, learned counsel for the defendants submitted, there is a delay of three and a half months as against the first defendant and one month as against the third defendant. Learned counsel for the defendants submitted that the period of delay as stated above is too long and inordinate for the plaintiff to be excused. Further, the learned counsel for the defendants submitted that there is no explanation given by the plaintiff as to the delay. Therefore in the absence of any acceptable explanation the plaintiff's applications should not be allowed. Learned counsel for the defendants cited the Federal Court of *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 where the court ruled that an application for summary judgment under O 14 r 1 of the RHC must be made soon after appearance had been entered. The court went further to say that the application may be made either before or after defence has been filed or served. However the court went on to say that if the application is made after defence has been filed or served then the plaintiff must explain the delay. If the plaintiff fails to explain or to give reasons for the delay in making the application in the affidavit in support of the application or if the explanation is not accepted by the court then the application for summary judgment under O 14 r 1 of the RHC may be refused. As to the duty of the plaintiff to explain the delay, learned counsel for the defendants

cited and relied on the Court of Appeal of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, at p 288. Learned counsel for the defendants urged upon me to apply the decision in *Krishnamurthy* and dismiss the plaintiff's applications. Learned counsel for the defendants submitted that *Krishnamurthy* was followed in *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1994] 2 MLJ 180, at p 184 and *Standard Chartered Bank Malaysia Bhd v Eng Song Huat* [1996] 1 MLJ 446, at p 451.

[19] Learned counsel for the plaintiff did not deny that there was delay in making the application until after the defences have been filed and that there is no explanation given for the delay. But he contended that the delay is not fatal. He further submitted that an application for summary judgment under O 14 ought not to be defeated solely on the ground of delay if there are no triable issues raised by the defendants and that the defendants have no defence against the claim. Learned counsel for the plaintiff relied on the Court of Appeal decision in *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818, [1998] 1 AMR 258. In that case there was a delay of five months after the delivery of the defence before the plaintiff/respondent applied for O 14 summary judgment; and the delay was not explained. Yet the Court of Appeal allowed the application and dismissed the appeal by the appellant. In dismissing the appeal, the court in that case rejected the proposition by the learned counsel for the appellant that an application for summary judgment under O 14 may be refused solely on the ground of delay. At p 821 of the report, Gopal Sri Ram JCA who delivered one of the two judgments in that case said this:

> Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O 14 where there are no bona fide triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

[20] I am in complete agreement with the above statement. But learned counsel for the defendants said I am bound by the doctrine of stare decisis and that I am bound by *Krishnamurthy*. Learned counsel for the defendants submitted that the doctrine of stare decisis was explicitly taken cognizance of by Ian Chin J in the case of *Loo Sze Kin v Cheong Choy Teik* [1977] 4 MLJ 537 where at p 543 his Lordship said:

> Unfortunately, the Supreme Court in *Krishnamurthy & Anor v Malayan Finance Corp Bhd* clearly stated that a plaintiff must explain the delay in applying for judgment after a defence has been delivered, which decision seems to imply that an application made one day after filing of the defence would still be considered a delayed application requiring an explanantion resulting in precious time being wasted in arguments as to whether the one day delay is acceptable or not while forsaking the primary and in fact the only consideration, whether there is any defence or not. Much as I disagree, I must follow *Krishnamurthy & Anor v Malayan Finance Corp Bhd* and can only hope and yearn for a change of view from the highest court of the land.

[21] I acknowledge that I am bound by the doctrine in that I am bound by the decision of a higher court. However in the hierarchy of the superior courts, I am first of all bound by the decision of the next highest court ie the Court

of Appeal. In my view, in applying the doctrine of stare decisis, I have to follow the decision of Court of Appeal. But where there is a conflict between the decision of Court of Appeal and the Federal Court (or the Supreme Court then), I think I have to look carefully at the conflicting decisions and see whether the Court of Appeal decision was made per incuriam – ie it was made without any regards or reference to a previous decisions by the apex court (ie the Supreme Court then or the now Federal Court) or the relevant statutory provisions on the same issue. If it is so then, I think I need not be bound by the Court of Appeal, but to follow the decision of the apex court. However if the decision of the Court of Appeal was made after due consideration is given to the apex court decisions and the relevant statutory provisions on the same issue, and whose decisions the Court of Appeal is also bound to follow under the doctrine of stare decisis, where do I stand particularly so when the decision of the Court of Appeal in question has not been overruled by the apex court such as in this case? I think I am bound also to follow the Court of Appeal. In this respect, I will take the approach taken by Skinner J in *Arab-Malaysian Credit Bhd v Dominance Resources Sdn Bhd & Anor* [2001] 2 CLJ 268, where at p 272 his lordship said:

> … that the doctrine of stare decisis requires that a High Court should loyally follow a decision of the Court of Appeal just as the Court of Appeal is required to do of a decision of the Federal Court.

[22] The learned judge then referred to the Federal Court case of *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829, [1997] 3 CLJ 365, which endorsed with approval the passage by Lord Hailsham LC in the English case of *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027 on the doctrine of stare decisis. Then at p 273 of the same report the learned judge says this:

> … if the Court of Appeal had got it wrong and had transgressed by not loyally following the earlier decision of the Supreme Court in *Krishnamurthy*, then only Federal Court can overrule such decision.

[23] I may also mention that his Lordship Ian Chin J in delivering the judgment in *Loo Sze Kin v Cheong Choy Teik* did not have the benefit of the judgment of the Court of Appeal in *Perkapalan Shamelin* (which was only reported in 1980). It can be seen from the passage quoted that Ian Chin J also expressed disagreement with *Krishnamurthy*, but felt that he had no choice but to follow because of the doctrine of stare decisis. Had his Lordship in *Loo Sze Kin* the opportunity to consider the decision of the Court of Appeal in *Perkapalan Shamelin*, he could have come to a different conclusion. In deciding to take the approach as Skinner J did in *Arab-Malaysian Credit Bhd*, I have taken note of the fact that *Perkapalan Shamelin* discussed and took into consideration the authorities referred to and relied upon by the Supreme Court in *Krishnamurthy*. NH Chan JCA who delivered the other judgment in *Perkapalan Shamelin* felt that he was not bound by *Krishnamurthy* because what was said in that case by Salleh Abas LP was only obiter and not the ratio decidendi of the case. His Lordship NH Chan JCA said it was obiter because *Krishnamurthy* was not dealing with an application for O 14 summary

judgment filed after defence had been served as in *Perkapalan Shamelin*. Likewise in the present case the facts are similar to *Perkapalan Shamelin* in that the application was filed after defence was served.

[24] In the case of *Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn Bhd & Ors* [1999] 6 MLJ 153, [1999] 2 CLJ 977, the learned judge, whilst acknowledging the manifested conflict of opinion on the point between the Supreme Court then in *Krishnamurthy* and the Court of Appeal in *Perkapalan Shamelin*, the learned judge refused to follow *Krishnamurthy*. Instead the learned judge in that case preferred the Court of Appeal's decision in *Perkapalan Shamelin*. The learned judge reasoned that the opinion expressed by the Court in *Krishnamurthy* is only obiter and that to apply *Krishnamurthy* to a case where the defendant clearly has no defence or had not raised any triable issue is to cause injustice. As to the rejection by the Court of Appeal of the proposition that a summary judgment under O 14 may defeated solely on the ground of delay, the learned judge in *Lee Wah Bank* had this to say at p 156 of the report:

> I found that most gratifying because I myself have been baffled as to the existence of a good reason for such a proposition. The statement is like a breath of fresh air.
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> The statement has further an implication. Taken literally, its corollary is that if there are bona fide triable issues, delay can provide an answer to an application for summary judgment. Since, however, the existence of a triable issue is the true answer to such an application, if a triable issue can be shown to exist, the application simply cannot succeed, and delay need not come into the balance at all. So what the statement amounts to is that delay is not relevant in an application for summary judgment. Irrespective of delay, if there is no triable issue or no reason otherwise for going to trial, the application must succeed, but if there is a triable issue, the application must fail.

[25] I am of the same opinion in that what was said by Salleh Abbas LP in *Krishnamurthy* is only obiter; and that delay cannot provide the answer to an O 14 application if there is no triable issue. I am also of the view that the principle that a plaintiff is entitled to an O 14 judgment if the defendant cannot show a triable issue is a time tested principle and makes good sense. It is a principle that goes to the merits of the plaintiff's claim; compare this to the principle of delay as decided in *Krishnamurthy*, it is only a technical defence; not on the merits. In my view the judicial trend now is to give consideration to substantial justice — real justice — rather than to defeat a meritous claim merely on grounds of technicality. It is for this reason also the Rules of the High Court 1980 was amended in 1993 to minimize objections on technicality which do not affect the substantive rights of the defendant or one that causes injustice to either parties.

[26] Therefore I hold that the delay in this case cannot defeat the plaintiff's claim which in my view has merits.

[27] The second issue raised by the defendants is that the plaintiff has no cause of action against them. Learned counsel for the defendants submitted that the statement of claim indorsed on the plaintiff's writ does not disclose any

cause of action and is lacking in many aspects especially material particulars which formed the basis of the plaintiff's claim against the defendants. I find this submission to be devoid of any merits. A perusal of the plaintiff's statement of claim clearly shows that the statement of claim contained all the material facts that needed to be pleaded by the plaintiff to bring to the attention of the first and third defendants the case against them. The statement of claim clearly pleaded the Restructuring Agreement and the act of the breach of the agreement. The plaintiff has also pleaded the demand made on the defendants. But what is more pertinent to note is that in cl 1.1 of the Restructuring Agreement the first defendant admitted and acknowledged that he is indebted to the plaintiff for the sum stated in the Restructuring Agreement. There is also no denial by the first defendant that he had breached the terms of payment under the Restructuring Agreement. Order 18 r 7 of the RHC requires only the material facts on which the plaintiff relies for his claim be pleaded — not all facts or evidence. Perusing the statement of claim I cannot say that any reasonable person would have any difficulty to understand and to know what the claim is all about. Furthermore it is the defendant that had come to the plaintiff for the restructuring of the loan facilities — the defendant should be aware.

[28] The third issue raised by the defendants is that of the alleged collateral contract with HSBC. Learned counsel for the defendants contended that the first defendant was persuaded to take up the loan facilities offered by HSBC because of certain representations made by the latter to the first defendant. Among these, the learned counsel for the defendants submitted, were HSBC's offer of competitive rates of interests; HSBC's good understanding of the project financing and the assurance of HSBC's support of the first defendant's project through good times as well as bad times. Learned counsel for the defendants then submitted that the plaintiff in offering the Restructuring Agreement to the first defendant have not taken into consideration of the collateral contract by HSBC. At para 62 of his written submission, the learned counsel for the defendants explained the collateral contract with HSBC in the following terms:

> The representations and assurances made by HSBC that HSBC would be supportive of the 1st defendant through good times as well as bad times and that the sole source of repayment of the project financing was from the sales of the Imperial Court project as set out above and the affidavits, which are undisputed, show that there was a collateral contract whereby it was agreed that the sales of the Imperial Court project would go to account for the payment of the loan facilities, that the repayment of the loan facilities is subject to the sales of the Imperial Court and that HSBC's loan documentation and Standard Form Guarantee would not be resorted to for the purpose of repayment. This is a collateral contract entered into between HSBC and the defendants, and HSBC's rights and interests in the matter are subject always to the collateral contract.

[29] But at para 63 of his written submission, learned counsel for the defendants conceded that the terms of the collateral contract as he explained above were not captured in the HSBC's facility documentation.

[30] In reply to the claim of the existence of a collateral contract by the defendants, learned counsel for the plaintiff submitted that the claim is a bare assertion without any documentary evidence to support it. I agree. In the first place, if the claim by the defendants is true, I find it hard to believe that the terms of the collateral contract were not captured in HSBC's facility documentation. The borrowing by the first defendant from HSBC is not a small sum borrowing. The figures run into millions. If the term of payment is the sales of the Imperial Court, surely in my view it constitutes a material term to the loan arrangement between the first defendant and HSBC. If that is so, then HSBC would have certainly included that in their facility documentation as a term of repayment of the facilities offered. The absence of the terms of the collateral agreement in HSBC's facility documentation, as conceded by learned counsel for the defendant, goes to show that HSBC was not relying on those terms and those terms never mattered in their granting the facilities to the first defendant. In my opinion, representations and assurances given by HSBC as claimed by the defendant are nothing more than a sales pitch made by a banker to attract prospective customers but with no intention of making them binding on themselves. In the second place, the alleged representations and assurances were also not part of the Restructuring Agreement. In fact when the first defendant approached the plaintiff to restructure the loan facilities that have been vested with the plaintiff, the first defendant entered into a fresh and new negotiation with the plaintiff. Therefore I agree with the submission of the learned counsel for the plaintiff that in considering the defendant's liability under the Restructuring Agreement the representations and assurances given by HSBC, if any, are totally irrelevant. Furthermore a bare assertion of representations made and assurances given does not add up to triable issues that necessitate a full trial (see *Abdol Mulok Awang Damit v Perdana Industri Holdings Bhd* [2003] 3 CLJ 497, at p 503 (also [2003] 4 MLJ 441).

[31] The next issue raised by the defendants is that the Restructuring Agreement was entered without the benefit of independent legal advice, onerous and unfairly tilted in favour of the plaintiff. I do not think so. It appears to me that the negotiation for the Restructuring Agreement is between two parties who are well informed about businesses and commercial dealings. Furthermore, it was negotiations on the basis of proposals made by the first defendant. It is not disputed that the first defendant has defaulted in the payment of the banking facilities granted by HSBC. When the plaintiff took over the facilities pursuant to the vesting, the first defendant's representatives came to the plaintiff to propose, inter alia, their scheme of payment to the plaintiff. This is evident by the minutes of meeting between the plaintiff and the representatives of the first defendant held on 14 June 1999 and 28 July 1999 which are exhibited in exh KMC-1 of Kong's affidavit. The written proposals by the first defendant to restructure the loans can be seen in a letter dated 16 December 1999 sent to the plaintiff and exhibited as exh KMC-2 in Kong's affidavit. Then by a letter dated 30 December 1999 (exh KMC-3 in Kong's affidavit) the first defendant proposed to amend its earlier proposals of 16 December 1999. In exh KMC-4 in Kong's affidavit, is a letter dated

9 March 2000 by the plaintiff to the first defendant showing that the plaintiff had agreed, at the request of the first defendant, to restructure the facilities on the terms and conditions stated in that letter. The first defendant accepted this and the second, third, and fourth defendants further confirmed that the guarantee that they had given to HSBC originally remains enforceable against them and is not prejudiced, affected or impaired in any way whatsoever as a result of the restructuring of the facilities. Now, in the light of these events and circumstances can one reasonably say that the Restructuring Agreement was entered under pressure and is unconscionable? I do not think so. As to the allegation of denial of independent legal advice, the defendant did not say anywhere in their affidavits in opposition to the plaintiff's applications that they were put in a circumstance or situation that they could not have access to independent legal advice. The defendants did not deny this.

[32] In *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1991] 2 CLJ 614 (Rep), the defendant tried to resist an application for an O 14 judgment by raising similar grounds as to the lease agreement in question in that case. On the same point, Chong Siew Fai J (as he then was) said:

> … A bargain cannot be unfair and unconscionable unless it is shown that one of the parties to it had imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or had procured the bargain by some unfair means.

[33] Surely in the instant case, having regards to the events and circumstances of negotiations between the first defendant and the plaintiff that led to the signing of the Restructuring Agreement, one cannot say that the plaintiff had procured the Restructuring Agreement by imposing on the first defendant an objectionable term or by some unfair means which is morally reprehensible. In fact there is no evidence at all in the affidavits filed by the defendants in this instant case to show otherwise.

[34] I am also of the opinion that in the normal and ordinary business negotiations one seldom finds parties to the negotiation negotiating on a perfectly level playing ground. In *Alec Lobb (Garages) Ltd and others v Total Oil GB Ltd* [1985] 1 All ER 303 (at p 313), it was said that 'inequality of bargaining power is a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are equal. Any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liability or buy some property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him'.

[35] On the authorities therefore, I hold that to rule that the Restructuring Agreement is oppressive and unconscionable, the defendants must show that the plaintiff has taken undue advantage of the first defendant's, relatively speaking, 'weak' bargaining position and imposed terms and conditions that are morally unconscionable and unfair. This, the defendants have failed to do. It follows therefore that there is no merits in this submission by the learned counsel for the defendants.

[36] As to the relevance of s 14(6) of the Pengurusan Danaharta Nasional Bhd Act 1998 to the plaintiff's applications insofar as it relates to the issue of vesting, which was raised in the submission by the learned counsel for the defendants, the plaintiff's counsel informed the court the he is not relying on that provision for this application. Furthermore the defendants have not raised in their defence or affidavits as to the constitutionality of the vesting to justify them raising the issue at the hearing of the applications. In any case learned counsel for the defendants eventually abandoned the submission on this point because he informed the court that he had prepared it in anticipation that the learned counsel for the plaintiff would rely on it. But as it turns out it was not the case. Therefore I express no views on this point.

[37] Next, learned counsel for the defendants submitted that the charging of default interest of 1%pa above the 'agreed rate' in the Restructuring Agreement is excessive, unconscionable and irrecoverable as against s 75 of the Contracts Act 1950. I find no merits in this submission. Clause 2.3 of the Restructuring Agreement clearly provides for the charging of the default interest rate as mentioned above. It is a covenanted interest rate that was agreed by the parties in the Restructuring Agreement. Therefore the plaintiff may charge such rate and not offend s 75 of the Contracts Act 1950. In *Bumiputra Merchant Bankers Bhd v The Melewar Corp Bhd & Ors* [1990] 1 CLJ 693 (Rep) the same issue was canvassed; and Siti Norma Yaakob J (as she then was) said at p 697:

> As this is an agreed term of the loan agreement, the defendants cannot now raise any objection to the imposition of such a rate and to that end, ss 74 and 75 of the Contracts Act do not apply.

[38] In a recent decision by the Court of Appeal in *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2001] 1 MLJ 513, where a similar point of penalty interest was in issue, Siti Norma Yaakob JCA ruled at p 524 as follows:

> To bring that increased or penalty interest within the ambit of s 75 [of the Contracts Act 1950], it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning the respondent could not now be heard to complain that the rate of 19%pa on all instalments due as at 30 June 1990, is excessive and under those circumstances that rate of interest could not be caught by s 75.

[39] In the same case and on the same point, Mohtar Sidin JCA, at pp 530–531 said this:

> It is clear to us that the agreement provided for penalty to be imposed for any breach committed by the respondent.
>
> There is no doubt in our minds that the extra 13% on the balance of the purchase price was the penalty to be imposed. Section 8.01 of the agreement provided for such imposition and this was agreed upon by the parties. The respondent knew of the penalty clause when it signed the agreement. The amount claimed by the appellants for penalty did not exceed the amount provided for by the agreement. Section 27 allowed the appellants to claim for such an amount without any proof of damages

suffered by the appellants. For that reason we found the judge had erred in his computation when he rejected the appellants' claim for penalty. The appellants were entitled to imposed the penalty until the date of termination.

[40] In this instant case too the first defendant was aware of the provisions in cl 2.3 of the Restructuring Agreement that allows the plaintiff to impose the penalty interest; so was the third defendant as a guarantor when he acknowledged and consented to the Restructuring Agreement. The defendants also have not shown that the penalty interest charged was excessive and had exceeded the amount agreed in the Restructuring Agreement. I therefore hold that this issue is not a triable issue.

[41] Still on the issue of interest charged by the plaintiff, learned counsel for the defendants cited the case of *OCBC Bank (Malaysia) Bhd v GKM Amal Bhd & Anor* [1999] 7 CLJ 73 and submitted that the imposition of the excessive rates of interest is against public policy. In the first place, since I find that the interest charged is not excessive this submission fails. In the second place, I agree with the submission by the learned counsel for the plaintiff that the facts in *OCBC Bank* are distinguishable from the facts in the instant case. In *OCBC Bank* the court found that the imposition of the increased interest rate was done unilaterally by the plaintiff in that case.

[42] Learned counsel also contended that the plaintiff is not entitled to the summary judgment sought because the demand by the plaintiff is excessive and bad in law. Again I find no substance in this submission. It can be seen from the background facts to this application alluded to earlier in this judgment, the plaintiff had agreed, on condition that the first defendant complied strictly with the repayment terms in the Restructuring Agreement, to waive a certain amount of the principal sum and the accumulated interest (see cl 1.2 of the Restructuring Agreement). However under cl 2.3 of the Restructuring Agreement, it was agreed between the parties that in the event the first defendant defaulted or delayed in making the payment the plaintiff shall become entitled to reinstate the full principal sum and interest before the waiver and to demand payment from the defendants. In this regard the defendants did not deny that they were in default of payment. Therefore in my view there is no basis for this contention.

[43] In addition to the above grounds, learned counsel for the defendants also raised other issues which he submitted are triable. These other issues may stated briefly as follows: a) that summary judgment ought not to be entered against the third defendant as a guarantor as the liability of guarantor is secondary to the principal debtor; b) that the plaintiff cannot rely on the conclusive evidence clause in the guarantee, and c) there is no proper account of the outstanding sum given to the defendants. I have given these issues my due consideration; and having heard both counsel's submission on these issues, I find that they are unsubstantiated and devoid of merits.

[44] In the circumstances I find that there are no triable issues that necessitate this case be put to full trial. I therefore allow the plaintiff's

applications in encll 42 and 52 with costs and that judgment be entered against first and third defendants.

Plaintiff's application allowed.

Reported by Izzaty Izzuddin